BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRYAN L. TOTTEN Claimant	)	
VS.	)	Docket No. 1,028,622
FORDYCE CONCRETE COMPANY, INC.[1] Self-Insured Respondent	)	

ORDER

Respondent requested review of the January 21, 2009 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on May 5, 2009.

APPEARANCES

Michael J. Haight, of Kansas City, Missouri, appeared for the claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for self-insured respondent (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that in the event the Board concludes that Kansas has jurisdiction in this matter, the ALJ's Award should be affirmed.

ISSUES

The ALJ concluded that claimant's employment contract with respondent was made in Kansas and therefore the Kansas Workers Compensation Act (Act) applies. He went on to award the claimant 18.33 weeks temporary total disability, a 14.5 percent whole body

[1] Although respondent's pleadings identified the carrier in this matter is Ash Grove Materials Corporation, the Division's records indicate that respondent is self-insured.

functional impairment and a 76 percent work disability based upon a 100 percent wage loss and a 52 percent task loss.

The respondent asserts a single issue in this appeal. Namely, that claimant failed to prove his contract for hire occurred in Kansas and thus, there is no jurisdiction to consider this claim. Respondent argues that the parties' contract arose from a telephone conversation, on Friday, April 28, 2001, between claimant (who was in Missouri) and respondent's superintendent (who was likewise in Missouri).

Claimant argues that the ALJ should be affirmed as he maintains there was no meeting of the minds and thus no contract until claimant appeared at the respondent's corporate office (in Overland Park, Kansas) on Monday, April 30, 2001, where respondent's job superintendent expressly offered claimant a job as a truck driver and claimant accepted that offer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed in all respects.

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board therefore adopts the ALJ's findings and conclusions as its own as if specifically set forth herein and will not repeat them except to explain its findings.

Since the accident in this case occurred in Missouri, the Act would apply to this claim only if the principal place of employment was Kansas[2] or the contract for employment was made in Kansas. K.S.A. 44-506 provides that "the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides."

It is a basic principle of law that a contract is "made when and where the last act necessary for its formation is done.[3] When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her

[2] Neither party asserts that claimant's principal place of employment was Kansas. Rather, jurisdiction hinges solely upon the finding that claimant's contract for employment was made within the State of Kansas.

[3] *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

acceptance.[4] In order to have a valid contract their must be a meeting of the minds as to the contract's essential elements.[5]

In this instance, the ALJ concluded that although Doug Berger, the superintendent, may have concluded he was going to hire claimant during their phone conversations, conversations that took place between the two gentlemen while they were both in Missouri, it remains uncontroverted by testimony that claimant did not receive an offer of employment until April 30, 2001 when he was standing in respondent's corporate offices in Overland Park, Kansas. Up until that time, claimant was continuing to seek other employment opportunities with other businesses and he has testified that he was confused at Mr. Berger's conduct in failing to expressly set forth his intentions about hiring him. Claimant drove to the corporate offices on April 25, 2001 to meet with Mr. Berger but he was gone, tending to business. Claimant's efforts to secure employment continued and he placed a number of calls to Mr. Berger, most of which went unanswered due, no doubt, to the press of other business.

When claimant finally spoke to Mr. Berger later that same day on the cell phone near his home, he was referred to a business in Grandview, Missouri for a drug test. Claimant did as he was told and proceeded to have a drug test and a physical examination. Claimant then attempted once again to contact Mr. Berger about the results. According to Mr. Berger this was a *post-offer* drug test. Respondent's office manager, Janice Smith, confirmed that this was the regular protocol. Drug tests and physicals for new hires were usually done only after a conditional offer of employment was made. Yet, claimant did not know this and continued to believe he was unemployed, most certainly because Mr. Berger was less than clear about his intention to hire claimant. And according to claimant, he had yet to meet Mr. Berger in person.

This ambiguity continued when claimant again contacted Mr. Berger about the job, this time on Thursday, April 26, 2001, and was asked to drive to Kansas once again and deliver his driver's license so that his driving record could be examined. Again, claimant complied but at no point did anyone offer him a job. In fact, up to this point, no one had discussed his rate of pay or the benefits available to him in this job. Claimant obviously was not aware he had been hired as he continued to pursue other avenues of employment both on his own (at Dunn Construction) and through the union hall.

On Friday, April 27, 2001, claimant and Mr. Berger spoke on the phone, but neither of them knows where they were. The parties agreed that claimant should come to the corporate office on Monday morning, between 6:30 and 7:00 a.m. Claimant agreed to this,

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[4] *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts § 64, Comment c (1974).

[5] *Sidwell Oil & Gas v. Loyd*, 230 Kan. 77, 630 P.2d 1107 (1981).

but testified that no job was offered to him. Instead, he seemed to believe he was there to interview with Mr. Berger. And while it is true that he was paid from the time he "clocked in" that Monday morning, claimant testified that it was only after he spoke rather bluntly to Mr. Berger asking him if he was hired that it was made clear to him that "we'll get you hired on"[6]

The ALJ offered the following analysis as justification for finding the contract was created in Kansas:

> The evidence from Berger and Smith supposed that the claimant was told he was hired before April 30, 2001, but the evidence did not directly contradict the claimant's testimony. Berger didn't remember what actually transpired between him and the claimant. Berger may have made up his mind to hire the claimant before he sent the claimant for the physical, but a contract occurs when both parties become of like mind. The claimant said he didn't know for sure if Berger intended to hire him until he spoke with Berger at the Overland Park office, and there was only speculative evidence to the contrary.[7]

The Board concurs with the ALJ's analysis. Although it may have been respondent's policy to send applicants for drug testing only after an offer of employment was made, Mr. Berger has no recollection of offering claimant a job before that time. And while he may have decided to hire claimant during phone calls, there is nothing in this record that would support the finding that an offer of employment was made before April 30, 2001. All of claimant's actions support his contention that he did not know that he had been hired. He was continuing to seek jobs elsewhere, all the while doing whatever he could to get in contact with Mr. Berger and meet whatever requests he had with respect to the prospect of employment with respondent. Only when claimant appeared in Overland Park, Kansas on Monday, April 30, 2001, and met with Mr. Berger did the parties have a meeting of the minds with respect to employment. Like the ALJ, the Board finds that meeting gave rise to a contract and therefore, Kansas jurisdiction is proper.

Pursuant to the parties' stipulations, the Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated January 21, 2009, is affirmed in all respects.

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[6] Claimant's Discovery Depo. (Apr. 24, 2008) at 39.

[7] ALJ Award (Jan. 21, 2009) at 4.

IT IS SO ORDERED.

Dated this _____ day of May 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge